UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, ex rel., DEBORAH RIVA MAGID,	)	96-CV-4346
Plaintiff,	)	
v.	)	
M.D., D.C. BARRY WILDERMAN, et al.,	)	Philadelphia, PA September 29, 2010 11:54 a.m.
Defendant.	)	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE R. BARCLAY SURRICK
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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(Appearances Continued)

For the Defendant Barry Wilderman:	GILBERT ABRAMSON, ESQUIRE Gilbert B. Abramson & Associates 1339 Chestnut Street The Widener Building, 5th Floor Philadelphia, Pennsylvania 19107
For the Defendant Steven Palloni:	ALFRED J. MONTE, JR., ESQUIRE Fox Rothschild LLP P.O. Box 3001 Blue Bell, Pennsylvania 19422

(Call to the Order of the Court)

THE COURT: Okay. We have the case of Magid v. Wilderman, et al. It's number 96-4346. Counsel, will you identify yourselves, please?

MR. INNELLI: Yes, Your Honor. John F. Innelli for the relator.

MR. MONTE: Alfred Monte, Jr., for Dr. Palloni.

MR. ABRAMSON: Gilbert Abramson for Dr. Wilderman and the Wilderman, P.C.

MR. CHEIKEN: Stanley Cheiken for Dr. Gewirtz.

THE COURT: Okay. Counsel, we've been discussing this matter in chambers. And it's my understanding that you've reached an agreement on how this matter is going to proceed from here.

MR. ABRAMSON: That's correct, Your Honor.

THE COURT: And you want to place that agreement on the record, is that correct?

MR. ABRAMSON: Yes, Your Honor.

THE COURT: Okay. Why don't you come forward and do that.

MR. ABRAMSON: Your Honor, the parties request that an order be entered as follows. That the order will state that the parties have agreed as follows.

That the above-captioned matter will be decided by arbitration. And that any final award in such arbitration proceeding shall be final and binding.

And the parties -- and such as may be entered as a judgment in any state or Federal Court. That's item one. Item two, the arbitration will be held before three arbitrators. The parties have agreed upon former Magistrate Judge Diane Welsh, former Common Pleas Judge, Abraham Gafni and former Superior Court Judge, Richard Klein, to serve as the three arbitrators.

In the event that any of those arbitrators are unable to serve, or unwilling to serve in the case, then former Common Pleas Judge Mary Collins shall serve as the alternate arbitrator.

I should say, Your Honor, that in the event that the -- that there are not three arbitrators who can serve, the parties will meet and confer to determine a substitute arbitrator.

THE COURT: All right.

MR. ABRAMSON: By agreement.

The notification to the arbitrators -- I guess this is item three, the notification to the arbitrators of their selection will be by joint letter from all counsel, advising the arbitrators of the nature of the action, the parties, and the estimated number of days of arbitration which will be required.

All communications with the arbitrators will be with all parties present. And, of course, there would be no ex parte communication with any of the arbitrators. These are all to be neutral arbitrators.

Number 5.

COUNSEL: I think you're up to 4.

THE COURT: Four.

MR. ABRAMSON: Four. In the event Judge Welsh -- strike that. Upon notification to the arbitrators of their selection, and upon their acceptance of their appointment as arbitrators, a conference among the arbitrators and all counsel will be held as promptly as possible.

Number 5. All pretrial orders of the Federal Court in this case, except to the extent that the order reserves decision for a later time, shall be final and binding upon the arbitrators.

Six. The following matters are reserved for decision by this Court:

(a) Relator will decide no later than October 12, 2010 whether to pursue his presently filed Rule 37 motion for default.

MR. INNELLI: Judge, did he say November?

MR. ABRAMSON: October 12th, 2010. Will decide no later than October 12th, 2010 whether to pursue his presently filed Rule 37 motion for default.

If he decides to pursue that motion, he will notify the Court and counsel, and defendants will have 30 days from the date of said notification to file an answer, and if appropriate, request a hearing before this Court.

(b) Relator will file a motion seeking an adverse inference for spoliation of evidence. Relator will have until October 25th, 2010 to file such motion. Defendants will have 30 days to file an answer, and if appropriate, request a hearing before this Court.

COUNSEL: Gil --

MR. ABRAMSON: Yes.

COUNSEL: I think you mis-spoke. I think you said November 25th. It's October 25th.

MR. ABRAMSON: I'm sorry.

THE COURT: October 25th.

MR. ABRAMSON: It should be October 25th, Your Honor.

(c) Defendant Palloni's previously filed motion for summary judgment is withdrawn without prejudice to re-file in arbitration.

Relator shall have 30 days from the date of this order to file his answer to said motion for summary judgment.

(d) If a final order is entered, e.g. the grant of default -- of a default judgment, the arbitration shall be stayed and defendants shall have the right to appeal said order in accordance with the Federal Rules of Appellate Procedure.

(e) All motions in limine pending before this Court shall be withdrawn without prejudice and re-filed in arbitration for determination by the arbitrators.

(f) The parties shall have the right to file additional motions in limine before the arbitrators.

I guess we're up to number 7. At the arbitration the Federal Rules of Evidence shall apply.

MR. MONTE: Gil, just -- the next item on 6 ought to be, I think, that the parties are relieved from the Court's pretrial scheduling order and all those pretrial requirements.

THE COURT: All right.

MR. ABRAMSON: Do I have to repeat that?

THE COURT: No.

MR. ABRAMSON: Okay. So, 8. Unless otherwise ordered by the arbitrators, arbitration -- arbitrators' fees and any court reporter fees shall be borne as follows.

Relator 25 percent. Defendants Barry Wilderman, M.D., P.C. and Barry Wilderman, M.D., 25 percent, combined. Defendant Eric Gewirtz 25 percent. Defendant Steven Palloni 25 percent.

Nine. Following this Court's decision with respect to the spoliation motion and the default motion, if filed, and assuming the default motion is denied, the case will be marked dismissed with prejudice. Referred -- and refer -- will be marked as follows.

Dismissed with prejudice, referred to arbitration. If that's acceptable to Your Honor.

There shall be no right in relator to appeal the -- I put this in, John, tell me if you have a problem with it.

Can I just confer with John?

THE COURT: Certainly.

(Pause)

MR. ABRAMSON: The next number, Your Honor. There shall be no right in relator to appeal a denial of a default motion, should a denial occur. And such decision by the Court shall be final and not subject to re-litigation in arbitration.

MR. INNELLI: You know what, Gil, we need to do something -- if the default is denied, we need to do something to allow me to get another expert witness.

MR. ABRAMSON: Just let me finish this, and -- except as agreed to herein and ordered herein, the arbitrators shall control the order, conduct and procedures of the arbitration process, including pre-arbitration, at hearings, and post hearing, with the understanding that, to the extent feasible, given the arbitrators and counsel's schedule, the hearing shall commence as promptly as is consistent with the arbitrator's schedules.

I believe it is also agreed that if Ms. Revel, who's the expert witness -- the relator's expert witness, is unavailable, that the defendants understand that the relator will be required to obtain other -- another expert. Do we agree with that?

MR. CHEIKEN: The way you said it, yes. I think counsel has --

THE COURT: Mr. Innelli?

MR. INNELLI: Your Honor, I think in the written final order that we submit to the Court, will refine the language. I would like that to be cited with regard -- alongside of the statement that any dismissal --

THE COURT: I think that's appropriate.

MR. INNELLI: -- is not appealable.

MR. ABRAMSON: And I think that's -- that would be the proper remedy.

THE COURT: All right. Counsel --

MR. ABRAMSON: Anything else?

MR. MONTE: If I just might add one thing, Your Honor?

THE COURT: Go ahead, Mr. Monte.

MR. MONTE: Since I am -- I've agreed to withdraw the motion for summary judgment from this Court's decision, which has already been submitted. I just want it clear that I have the right to re-file that with the arbitrators.

THE COURT: That was without prejudice to re-file.

MR. MONTE: I understand. Okay. Thank you.

THE COURT: All right. Anything further?

MR. ABRAMSON: I think there's -- the one other question, Your Honor, is, is and this doesn't have to be part of the order, but the appropriate time to communicate with the arbitrators.

In light of the fact that there are going to be motions pending before Your Honor, and I don't know whether you should wait until --

COUNSEL: Why don't we go off the record for a second.

MR. ABRAMSON: Yeah, can we go off the record?

THE COURT: Off the record.

(Off the record - On the record)

MR. MONTE: For the record, Your Honor, there will be no communication with any of the arbitrators by any of the parities or their counsel, until Mr. Innelli has either filed and his motion for default has been decided by this Court, or Mr. Innelli has notified us that he does not intend to file such a motion.

THE COURT: All right.

MR. MONTE: Thank you, Your Honor.

MR. ABRAMSON: And the time for the filing has been -- or notification is mentioned in the order.

THE COURT: As has been indicated.

MR. ABRAMSON: Yes.

THE COURT: Yes. All right. Counsel, it's on the record at this juncture. You can formalize it, I will approve it and we'll go from there.

COUNSEL: Thank you, Your Honor.

(Case adjourned)

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C E R T I F I C A T I O N

I, Josette Jones, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Josette Jones Digitally signed by Josette Jones
DN: CN = Josette Jones, C = US
Date: 2010.09.30 11:27:57 -04'00'

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JOSETTE JONES DATE

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